2009

State of Utah v. Brenda Christine White : Reply Brief

Utah Supreme Court

Mark L. Shurtleff, Laura B. Dupaix; Attorneys for Appellee.
Jason A. Schatz, Richard G. Uday; Attorneys for Appellant.

IN THE UTAH SUPREME COURT

STATE OF UTAH,	)	
	(	**REPLY BRIEF**
Plaintiff/Appellee.	)	**OF APPELLANT**
	(	
vs.	)	
	(	
BRENDA CHRISTINE WHITE,	)	
	(	**Case No. 20090322**
Defendant/Appellant.	)	

Interlocutory appeal from the decision of the Utah Court of Appeals holding that the Appellant was required to demonstrate a highly provocative and contemporaneous triggering event as a prerequisite to an affirmative defense of extreme emotional distress as had been decided by an interlocutory order of the Honorable William W. Barrett, Judge, Third Judicial District Court in and for Salt Lake County, State of Utah. Petition for Writ of Certiorari was granted by this Court by Order entered July 28, 2009.

JASON A. SCHATZ, # 9969
RICHARD G. UDAY, # 5355
Attorneys for Appellant
Schatz, Anderson & Uday, LLC
57 West 200 South, Suite 200
Salt Lake City, Utah 84101

MARK L. SHURTLEFF, # 4666
LAURA B. DUPAIX, # 5195
Attorneys for Appellee
Office of the Utah Attorney General
160 East 300 South, Sixth Floor
Salt Lake City, Utah 84114-0854

ORAL ARGUMENT REQUESTED

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JASON A. SCHATZ, # 9969
RICHARD G. UDAY, # 5355
Attorneys for Appellant
Schatz, Anderson & Uday, LLC
57 West 200 South, Suite 200
Salt Lake City, Utah 84101

MARK L. SHURTLEFF, # 4666
LAURA B. DUPAIX, # 5195
Attorneys for Appellee
Office of the Utah Attorney General
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Utah Code Ann. § 76-5-203(4) (in pertinent part): [Extreme Emotional Distress]

> (4)(a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:
>
> (i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse;
>
> .....
>
> (b) Under Subsection (4)(a)(i) emotional distress does not include:
>
> (i) a condition resulting from mental illness as defined in Section 76-2-305; or

(ii) distress that is substantially caused by the defendant's own conduct.
(c) The reasonableness of an explanation or excuse under Subsection (4)(a)(i) or the reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.
(d) This affirmative defense reduces charges only as follows:
(i) murder to manslaughter; and
(ii) attempted murder to attempted manslaughter.

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SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals (and the trial court) being challenged and requested to be overturned by this Court require that before an accused may present the affirmative defense of extreme emotional distress to the jury she must demonstrate a highly provocative and contemporaneous triggering event as a prerequisite to relying on the defense. Ms. White insists the decisions by the courts below are in error.

The State responds that the Court of Appeals decision does not change the law despite the acknowledgement that "Utah cases have not used that precise verbal formulation." Brief of Respondent at 13. To support its position the State relies on a number of cases and arguments that Ms. White urges are not helpful to this analysis and which understate the facts presented and proffered in support of

the affirmative defense, ignore an accused's right to present her defense and denies the critical role the jury plays in her right to a fair and impartial trial.

This Court should find the facts of this case as outlined in her opening brief to be more than sufficient evidence to meet the correct standard of presenting the case to the jury on the defense of extreme emotional distress for which there is a reasonable explanation or excuse. Appellant's Opening Brief at 5-10.

Ms. White relies on the argument submitted in her opening brief as well as the following reply.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT AN ACCUSED IS REQUIRED TO DEMONSTRATE A HIGHLY PROVOCATIVE AND CONTEMPORANEOUS TRIGGERING EVENT AS A PREREQUISITE TO PRESENTING THE STATUTORY AFFIRMATIVE DEFENSE OF EXTREME EMOTIONAL DISTRESS TO THE JURY.

This Court recently decided important guidelines to determine the appropriateness of a request for an affirmative defense instruction. As only partially recognized by the State in its answer, extreme emotional distress manslaughter or attempted manslaughter law has changed. Brief of Respondent at 17-20. Extreme emotional distress manslaughter is no longer a lesser included offense of murder or attempted murder charges, but since 1999 are now affirmative defenses to the charges. The change, in large part unaddressed by the State, is important to this Court's decision as much of the argument of the State

relies on prior case law and arguments which predate the analysis and are not applicable authority in our matter before the Court. This Court explained:

> Under the plain language of Utah's murder and manslaughter statutes, extreme emotional distress manslaughter and imperfect self-defense manslaughter are affirmative defenses to murder. They are no longer lesser included offenses of murder. *For this reason, we do not discuss whether the State was entitled to jury instructions for extreme emotional distress manslaughter and imperfect self-defense manslaughter based upon our prior case law regarding lesser included offenses.* Rather, we are bound by the legislature's decision to categorize extreme emotional distress manslaughter and imperfect self-defense manslaughter as affirmative defenses to murder.

State v. Low, 2008 UT 58, ¶ 24, 192 P.3d 867, 876 (emphasis added).[1] The significance of that change for Ms. White and her Petition to this Court is that in delineating when a court properly instructs on an affirmative defense of extreme emotional distress this Court provides its guidance as follows:

> *When a criminal defendant requests a jury instruction regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented-either by the prosecution or by the defendant-that provides any reasonable basis upon which a jury could conclude that the affirmative defense applies to the defendant.* See State v. Knoll, 712 P.2d 211, 214 (Utah 1985) ("[W]hen there is a basis in the evidence, whether the evidence is produced by the prosecution or by the defendant, which would provide some reasonable basis for the jury to conclude that a killing was done to protect the defendant from an imminent threat of death by another, an instruction on self-defense should be given the jury."); State v. Torres, 619 P.2d 694, 695 (Utah 1980) (stating that a party is "entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it").

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1. The State's reliance on State v. Price, 909 P.2d 256 (Utah App. 1995); State v. Piansiaksone, 954 P.2d 861 (Utah 1998); and State v. Clayton, 658 P.2d 624 (Utah 1983) are unhelpful because they were decided before the legislative change and are not affirmative defense cases. Ms. White's opening brief also includes arguments why they are further distinguishable from the analysis required herein.

Id. at ¶ 25 (emphasis added). This Court added the additional clarification and examples of appropriate applications of this change from a lesser included analysis to a requested affirmative defense instruction. This Court instructed:

> We have applied this rule with respect to the affirmative defenses of imperfect self-defense manslaughter and extreme emotional distress manslaughter. See State v. Spillers, 2007 UT 13, ¶¶ 16, 23, 152 P.3d 315; State v. Shumway, 2002 UT 124, ¶¶ 13, 14, 63 P.3d 94. For example, in Spillers, we held that a criminal defendant was entitled to a jury instruction on imperfect self-defense manslaughter because the evidence presented by the defendant *could have been interpreted by the jury* to establish imperfect self-defense. 2007 UT 13, ¶ 23, 152 P.3d 315. We also held that the defendant was entitled to a jury instruction on extreme emotional distress manslaughter because "a rational jury could, adopting Defendant's version of events, find that he was experiencing extreme emotional distress for which there was a reasonable explanation or excuse when he shot [the victim]." Id. ¶ 16.

Id. at ¶ 26 (emphasis added).[2]

As discussed in her opening brief, Ms. White maintains that State v. Spillers [II], 2007 UT 13, 152 P.3d 315, and State v. Shumway, 2002 UT 124, 63 P.3d 94, assist in demonstrating the error of the Court of Appeals and the trial court in this matter.

In Shumway the Court described the circumstances as follows:

> One interpretation of the evidence supports the necessity for a manslaughter instruction under subsection (3)(a)(i). Brookes [the defendant] disclosed to police that on the morning of the altercation Christopher was irritated at him for beating Christopher at video games. As

[2] This Court did not require the jury instruction in Low's case as he did not request that instruction be offered as his defense and only the State had urged the affirmative defense of extreme emotional distress over his objection. Low, 2008 UT 58 @ ¶ 26.

> the boys went to bed, Christopher went to the kitchen and retrieved a knife that he began to throw in the air and catch. Christopher then lunged at Brookes and began poking him with the knife. The boys wrestled over control of the knife and in his anger, Brookes stabbed Christopher. Brookes also suffered stab wounds to his hand. There was evidence that Christopher had a reputation for being a "hothead" and losing his temper, while Brookes was known to be cooperative and peaceful. Other evidence supported the argument that Brookes had been bullied and pushed around by his peers since he was in the third grade, and that all of this "came out on Chris" when the boys fought over the knife.

Id. at ¶ 10. The facts revealed that Shumway was 15 years old at the time of the murder; third graders are 8 or 9 years of age so this particular—and determined to be a relevant—distress factor relied on by the Court in Shumway was six or seven years old. Similarly the Court spoke of reputation evidence which by practical definition cannot be created from a single event but must necessarily be ascertained over time.

This Court recognized in Shumway that circumstances which may have occurred years prior to the offense could certainly contribute to the defendant's mental state at the time of the offense, and likewise could be considered by a jury in determining whether the defendant acted under the influence of "extreme emotional distress for which there was a reasonable explanation or excuse." The Court reversed the murder conviction in Shumway because the jury was not instructed appropriately and because the jury was not allowed to determine the reasonableness of the defendant's acts under those stressors.

In State v. Spillers, 2005 UT App. 283, 116 P.3d 985, aff'd 152 P.3d 315 (Utah 2007), the State had appealed the Court of Appeal's decision claiming that

court erred in reversing the conviction because of the trial court's failure to give an extreme emotional distress instruction. The State claimed, as the State does here, that Spillers did not merit the instruction. This Court responded to the State's argument that it remakes here as follows:

> [T]he State's assertion rests on its own conclusion that Defendant acted "rationally" throughout the encounter; however, *the question of whether Defendant acted "rationally" is a question of fact properly belonging to the jury*. While a jury could adopt the State's version of events and convict Defendant of murder, a jury could also believe Defendant's interpretation of the evidence and conclude that he was not acting rationally, but rather was under extreme emotional distress as a result of Jackson's attack and convict on the lesser offense of manslaughter.
>
> Second, the State contends that Defendant did not present evidence that he was in fact experiencing "extreme emotional distress." Rather, the State maintains that Defendant merely testified that he felt nervous and that the blow to his head left him feeling cloudy, dazed, uncomfortable, and scared-terms not indicative, in the State's view, of extreme emotional distress.

State v. Spillers [II], 152 P.3d 315, 2007 UT 13, ¶ ¶ 18-19. The trial court's conclusions, similar to the State's position in Spillers II, rests on the conclusion that defendant acted rationally and had a plan. Findings of Fact and Conclusions of Law at 5 –in Opening Brief of Appellant at Addendum C. As this Court stated in Spillers II, whether Ms. White acted rationally here is a question of fact properly presented to the jury.

In contrast, and demonstrating the trial court's error here, this Court in Spillers II characterized those same facts as follows:

> Like Shumway this case could be interpreted to support Defendant's contention that he experienced extreme emotional distress and was

> therefore entitled to a manslaughter instruction. Defendant testified that he and Jackson were arguing prior to the altercation and that Jackson was upset with him, accusing him of snitching to drug enforcement officers. The tone of the conversation made Defendant nervous. Defendant stated that Jackson retrieved a firearm and struck Defendant on the back of the head. Defendant testified that the blow left him cloudy, dazed, uncomfortable, and scared. According to the nurse's testimony, the blow may have resulted in a two-inch hematoma that was present on Defendant's head the day after the shooting. Defendant testified that after being struck, he turned to face Jackson, who was cocking his arm back to strike Defendant again. At that point, Defendant shot Jackson three times, although at trial he testified that he remembered firing only a single shot. Further, witnesses testified that Jackson had a reputation for violence. Thus, a rational jury could, adopting Defendant's version of events, find that he was experiencing extreme emotional distress for which there was a reasonable explanation or excuse when he shot Jackson.

Id. at ¶ 16. Ms. White's case, like that of Shumway, relies on the initiating incident only as the starting point for the analysis allowing the jury to determine the reasonableness, if any, to the claimed affirmative defense. Again, distress and the factors which create it, are acquired over time, permitting something less than a single highly provocative triggering event to justify granting the defense. The trial court's opinion to the contrary is erroneous as is the Court of Appeals decision affirming that ruling. R. 652; Appellant's Opening Brief at Addendum C p. 5.

The State and the lower courts focus primarily on the fact that Ms. White reacted to her ex-husband's use of a cell phone as the important and insufficient triggering fact which then justifies the decision to deny the requested affirmative defense instruction. Brief of Respondent at 26. Much more has been proffered to the court and would be presented at trial as detailed in the factual statement of the

opening brief. Importantly, however, the trial court included only a few of those arguments in the findings and conclusions it reached in denying Ms. White's motion in limine.

The facts which built over time then causing her on April 26, 2006, to lose control because of her overwhelming feelings of anger, agitation and distress are contained in her opening brief. See Opening Brief of Appellant at pp. 5-10 and repeated here in the reply brief in Addendum A.

The trial court's conclusion to deny Ms. White her requested affirmative defense instruction and deciding that there was no rational basis in the evidence for that theory not only usurps the duties of the jury but unfairly denies her the right to present her statutory and constitutional right to her affirmative defense to have the jury determine the reasonableness of her actions.

This Court has acknowledged, as quoted above, that the instruction is required to be given any time a rational jury could, adopting the Defendant's counting of the events, find that she was experiencing extreme emotional distress for which there was a reasonable explanation or excuse.

As noted, this Court required an instruction on the affirmative defense of self-defense to be given in State v. Standiford, 769 P.2d 254, 264, 266 (Utah 1988), based on the defendant's theory of self-defense where he had stabbed the victim 107 times. Again, this Court further explained and also held that a defendant would be entitled to an instruction on extreme emotional distress

manslaughter where the victim had been stabbed twenty-seven times and died of multiple critical wounds. State v. Cloud, 722 P.2d 750, 753-55 (Utah 1986). See also, State v. Brown, 607 P.2d 261, 265 (Utah 1980)(where the defendant's evidence, although in material conflict with the State's proof, is such that the jury may entertain a reasonable doubt as to the defendant's theory, she is entitled to have the jury instructed fully and clearly on the affirmative defense if there is *any basis* in the evidence to support that theory); State v. Lopez, 789 P.2d 39, 44-45 (Utah App.1990)(a defendant is entitled to have the jury instructed on his theory of the crime if there is any basis in the evidence to support that theory).

Ms. White insists there is ample basis in the evidence developed thus far, and even additional evidence to be developed,[3] to support her theory of the affirmative defense that she suffered from extreme emotional distress for which there is a reasonable explanation or excuse at the time of the criminal events as alleged by the State in this matter.

Also critical in this analysis is the reminder that this Court provided when reviewing the appellate court's decision in Spillers II. The Court reminded us as follows:

> [A] defendant in a criminal case bears no burden of persuasion. "The ultimate burden of proving the defendant's guilt beyond a reasonable doubt

[3] Ms. White refers to the fact that the trial court indicated its willingness to allow the alleged victim to be deposed and the answers to the questions desired at the preliminary hearing (and others) obtained from Jon White. R. 713 at 15. Such questions would undoubtedly develop additional information in support of the type and depth of stressors placed on Ms. White. Due to the current posture of the case, however, such a deposition has yet to occur.

> remains on the state, whether defendant offers any evidence in an effort to prove affirmative defenses or not." ... Accordingly, a defendant is not required to use particular language or key words in his testimony to identify his mental state as extreme emotional distress before a jury may consider that defense in a criminal trial. As long as the evidence presented at trial supports a defendant's theory of the crime and provides a rational basis for a verdict on the lesser included offense, a defendant is entitled to the jury instruction if he requests it.

Spillers II, 152 P.3d 315, 2007 UT 13, ¶ 19 (citations omitted).

Accordingly, as Ms. White has urged, this Court has already recognized that there are factors or events that may have occurred long before the offense which are relevant and therefore appropriately must be considered by a jury in determining whether an accused has acted under the influence of "extreme emotional distress for which there is a reasonable explanation or excuse." The initiating event need not be a violent or tumultuous event. All that is required is that there be "some external initiating circumstance" bringing out the distress accompanied by extremely unusual and overwhelming stress such that a reasonable person under that stress as viewed under the then existing circumstances would have an extreme emotional reaction to it. This determination in this case is a question for the jury to decide.

CONCLUSION

Ms. White is entitled to her theory of the defense if any evidence supports it from which the jury could return such a verdict. In Ms. White's case, no single violent event triggered her behavior. Rather a loss of self control arguably occurred due to a lengthy repeated and escalating pressure overborne by intense

feelings such as passion, anger, distress, grief, excessive agitation and similar emotions. These stressors very realistically were extreme and overwhelming for someone under the then existing circumstances reasonably brought about over time by the external forces of Jon White's behavior towards her, coupled with the escalating financial pressures and extreme family and work stressors, including the death of her doctor and counselor and the changes in her medicine regime. Her circumstances meet the requirements of submitting the affirmative defense of extreme emotional distress to the jury.

The Court of Appeals decision sweeps too broadly and forecloses too many from the affirmative defense of extreme emotional distress and should be overturned by this Court.

RESPECTFULLY SUBMITTED this 16th day of November, 2009.

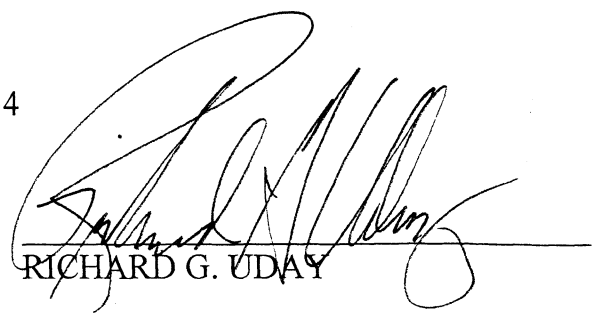
JASON SCHATZ
Attorney for Ms. White

RICHARD G. UDAY
Attorney for Ms. White

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2009, I have caused one original and nine true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to be filed with the Clerk of the Utah Supreme Court and two additional copies to be mailed first class to the following:

The Office of the Attorney General
Attn: Laura B. Dupaix, Esq.
Attorney for Appellee
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854



RICHARD G. UDAY

I mailed/delivered the number of copies to the Utah Supreme Court and the Assistant Attorney General Laura B. Dupaix, as indicated above this ___ day of November, 2009.

ADDENDUM A

Proffered Facts (from Opening Brief)

An in-chambers discussion occurred where the defense proffered the testimony of certain actions and events which the ex-husband employed over the more recent period of the marriage to manipulate and distress Ms. White. R. 711 at 74-82. This testimony included Jon White's treatment of Ms. White through the marriage, including a rather recent period of Jon White's marital infidelity, an extra-marital affair with a co-worker. R. 711 at 75-76. The defense also proffered an instance later in the marriage documented by a police investigation and report of the possession and use/abuse of child pornography by Jon White. R. 711 at 73-75. Additionally, the defense introduced a proffer describing a sexual tryst the ex-husband had arranged where he orchestrated a "threesome" with yet another co-worker and Ms. White. R. 711 at 74-80.

Other problems existed in the marriage and more specifically the dissolution of the marriage and were proffered to the district court in support of the motion in limine. R. 714. Ms. White and the children were not receiving any financial support from Jon White from the time he left at Thanksgiving of 2005 and she was forced to make a mediation agreement in January to settle the divorce on the promise of getting some money to support the family. Poor legal advice assured her that giving up monthly income via alimony, house and bill payments was a fair trade for his half of the equity in the home. R. 443-50. There were no temporary orders obtained by her lawyer to provide for interim payments and the settlement agreement signed in January provided none, except for child support beginning in March. Id.

Ms. White was on medications for anxiety, depression and sleep. R. 444. During this time Jon White was to provide health coverage for the family but on two separate occasions he cancelled the coverage causing a lapse in her ability to acquire the medication which resulted in an increase in her anger, her depression and all that went with it. Ms. White, on one occasion, was required to go to Jon White's workplace herself to have the insurance benefits reinstated. In the meantime she was without her medications. She had no money to pay for them. Moreover, she deteriorated in her mental state and ability to deal with all that was going on around her. Id.

She was a single mother of two children working a $ 12.50 cent an hour job, at a telephone call center, with new financial obligations of approximately $ 1,400.00 per month on a first and second mortgage, plus credit card debt resulting from the marriage of another $ 200.00 to $ 300.00 per month and all the other family expenses. R. 433, 443-450.

Ms. White had to increase her work from part-time to full time; and in fact, began to work overtime—often working up to as much as 60-70 hours a week to try and make ends meet. Id. Ms. White saw less of her children than before which resulted in additional stressors from the children. And at the same time, Jon White began to withdraw from participating with the children. R. 446. Jon White would make the visits difficult for Ms. White; for example, he would insist on an 8 o' clock pickup of the children on times when he knew Ms. White was in a group counseling class that did not terminate until 8 p.m. Id. He would require that Ms.

White leave the counseling sessions early to pick up the children at 8 p.m., rather than waiting until 8:15 p.m., or he would require her to arrange for someone else to do so.

As money became more difficult her ability to pay for medications decreased and her doctor assisted by providing sample packets of the medications whenever she could. However, that doctor died in early April leaving her without a treatment doctor and without appropriate medication. R. 446-47; 711 at 79.

The mediation agreement, determined in January, to eventually become the divorce settlement, still left her without finances. The unfortunate settlement provided that Ms. White would receive the equity in the home, but would be required to pay from that equity an approximated additional $ 10,000.00 of debt accumulated during the marriage. Of course, she had to pay these bills in the interim, while waiting for the settlement date to arrive. R. 447.

While the settlement agreement would provide Ms. White with child support of approximately $ 650.00 per month, no relief was in sight. R. 447. She fell behind in house and bill payments despite working so much overtime. As part of the settlement agreement urged on her by her counsel, Jon White insisted that he not participate in paying the house payments and that he surrender his half of the equity in trade for no alimony and no payments. Id.

The unfortunate reality of the settlement was that the equity she now had in the home was of no value unless she could get the money out and pay the living expenses, mortgages and other bills. Id. If she could not refinance the mortgages

and get the equity out to live on she could even lose the house. Ms. White began to see the potential of this reality after the settlement and her finances did not improve. R. 447-48. She desired to refinance the home to free up that money to live on and pay the bills as anticipated in the agreement. However, due to her short work history, large debt and late payments, Ms. White could not get a loan to refinance the home. Ms. White approached Jon White for the assistance with the refinance that he had promised, and he vacillated and backed out of his agreement to do so. R. 447-48; 711 at 33-35.

Ms. White could not obtain the refinancing without him. Id.

She finally contacted new counsel and discussed attempting to re-open the divorce agreement as unworkable. R. 444, 448.

Jon White then agreed to assist with the refinance but then he would back out again. R. 448.

The relationship between Jon White and the children became more problematic. He spent less time with them, disappointed them more and was unavailable for contact. Ms. White requested that he provide his cell phone number to her so the kids could contact him directly, but he repeatedly told her that he did not have one. R. 448-49. He was becoming less and less involved in caring for and caring about his family. Id.

The day of the incident, April 26th, Ms. White went to Jon White's workplace earlier in the day to speak with him and have him talk on the phone to the mortgage broker. He refused to do so until later in the day. When she went

back the second time, he spoke with the mortgage broker but he would not cooperate in the refinance. R. 711 at 33-34.

During the second visit Ms. White spoke with Jon White again about the refinance of the mortgages and assisting in providing for his children. Ms. White felt he had promised to assist her in releasing the equity from the home. R. 448.

When Ms. White saw Jon White leave the workplace talking on a cell phone, a cell phone that he denied owning for communication with the children. Ms. White was overcome with all that has been described above. R. 449. Her anger, agitation, loss, grief and the disappointment for her and the children resulted in her inability to control herself. Those emotions controlled her actions. R. 448-49.

These events and others including the fact that Ms. White was only recently aware that Jon White now was actively dating the co-worker with whom he had the affair, were at the base of the defense theory of the case supporting the request to permit the defense of extreme emotional distress to the jury. R. 447-49. All of these events were described as occurring within the last two to three years, some even more recent in time and prior to the offenses in question. R. 711 at 76.